

Golden Gate University School of Law
GGU Law Digital Commons

Publications

Faculty Scholarship

2004

**Environmental Justice in Cuba: Capital Needs, Developing a
Tourist Infrastructure, and Liberty of Access to National
Resources**

Colin Crawford

Follow this and additional works at: <https://digitalcommons.law.ggu.edu/pubs>



Part of the [Environmental Law Commons](#), and the [Land Use Law Commons](#)



DATE DOWNLOADED: Tue Mar 30 12:54:12 2021

SOURCE: Content Downloaded from [HeinOnline](https://heinonline.org/HOL/License)

Citations:

Bluebook 21st ed.

Colin Crawford, Environmental Justice in Cuba: Capital Needs, Developing a Tourist Infrastructure, and Liberty of Access to National Resources, 14 Transnat'l L. & CONTEMP. Probs. 55 (2004).

ALWD 6th ed.

Crawford, C. ., Environmental justice in cuba: Capital needs, developing a tourist infrastructure, and liberty of access to national resources, 14(1) Transnat'l L. & Contemp. Probs. 55 (2004).

APA 7th ed.

Crawford, C. (2004). Environmental justice in cuba: Capital needs, developing tourist infrastructure, and liberty of access to national resources. Transnational Law & Contemporary Problems, 14(1), 55-80.

Chicago 17th ed.

Colin Crawford, "Environmental Justice in Cuba: Capital Needs, Developing a Tourist Infrastructure, and Liberty of Access to National Resources," Transnational Law & Contemporary Problems 14, no. 1 (Spring 2004): 55-80

McGill Guide 9th ed.

Colin Crawford, "Environmental Justice in Cuba: Capital Needs, Developing a Tourist Infrastructure, and Liberty of Access to National Resources" (2004) 14:1 Transnat'l L. & Contemp Probs 55.

AGLC 4th ed.

Colin Crawford, 'Environmental Justice in Cuba: Capital Needs, Developing a Tourist Infrastructure, and Liberty of Access to National Resources' (2004) 14(1) Transnational Law & Contemporary Problems 55.

MLA 8th ed.

Crawford, Colin. "Environmental Justice in Cuba: Capital Needs, Developing a Tourist Infrastructure, and Liberty of Access to National Resources." Transnational Law & Contemporary Problems, vol. 14, no. 1, Spring 2004, p. 55-80. HeinOnline.

OSCOLA 4th ed.

Colin Crawford, 'Environmental Justice in Cuba: Capital Needs, Developing a Tourist Infrastructure, and Liberty of Access to National Resources' (2004) 14 Transnat'l L. & Contemp Probs 55

Provided by:

Golden Gate University School of Law Library

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

Environmental Justice in Cuba: Capital Needs, Developing a Tourist Infrastructure, and Liberty of Access to National Resources

Colin Crawford*

I. TOURISM IN CUBA TODAY AND ITS ENVIRONMENTAL JUSTICE IMPLICATIONS	57
II. PROVISION OF ENVIRONMENTAL BENEFITS FOR ENVIRONMENTAL JUSTICE	62
<i>A. Two Concepts of Liberty and Environmental Justice</i>	63
<i>B. Other Approaches</i>	68
III. ENSURING LIBERTY OF ACCESS.....	70
<i>A. U.S. Examples</i>	70
<i>B. Cuban Law and Beyond</i>	73
<i>C. International Protections for Environmental Justice in Cuba</i>	74
<i>D. A Role for the United States?</i>	78
IV. CONCLUSION.	79

Careful readers of this paper will note that the penultimate word in the title is “national.” This is slightly odd coming from an environmental law professor; in my business, the usual modifier for “resources” is “natural.” In fact, the “national” resources to which the title refers are mostly “natural” resources, such as beaches and rainforests. At the outset, it needs to be recognized, therefore, that in choosing the word national, I have tipped the scales from the start. That is, I assume that the natural resources discussed here are first and foremost national resources as well—distinct from international patrimony, for example.

In environmental circles, this can be a heretical notion. Identifying a nation’s interest as superior to all others can be potentially dangerous, as the example of the extreme environmental degradation of the former Soviet Union attests.¹ In the case of Cuba, former client state of the Soviet Union,

* Associate Professor, Georgia State University College of Law. I am grateful to Amy Pilat McMorro, Georgia State class of 2004, for her research help in the preparation of this essay and to Eric Mitnick and Bill Edmundson for their extremely helpful criticism.

¹ See, e.g., R. David Simpson & Michael A. Toman, *Environmental Policy in a Transitional Economy: Problems and Prospects in Russia*, 5 GEO. PUB. POL’Y REV. 137 (2000) (describing the difficulty of dealing with problems related to the “deforestation, soil erosion, [and] agricultural

the suggestion is equally problematic. To a considerable extent, in pre-1990 Cuba "the Soviet development model of gigantism and development of heavy industry prevailed, with adverse implications for the environment."² In short, the Soviet Communist legacy appears to have left Cuba with no vibrant national tradition of environmental protection. Similarly, pre-Communist colonial rulers, first from Spain and then from the United States (as unofficial but de facto overseer) were concerned with exploitation of natural resources and not with conservation.³

For some, it is equally heretical to suggest, in the Cuban context, that resources might be "national" since that term might be understood to constitute the patrimony of the current Cuban state. Before proceeding further, it is therefore essential for me further to clarify what I mean here by "national." I am not suggesting in this that the resources in question are the property of the republican nation (or, depending on one's perspective, the communist regime) that is Castro's Cuba. Rather, what I mean by the term national is really "popular Cuban resources"—in the sense of common property the ownership of which resides in the Cuban population, in the people themselves.⁴ It is the central contention of this article, therefore, that as it expands its tourist infrastructure, the island state is doing so in a manner that systematically denies its citizens access to environmental amenities. The article continues by suggesting that Cuba's process of development violates its population's fundamental liberty interests, and suggests that liberty—even more than equality—may be the preferred theoretical basis to defend environmental justice claims that seek to assure the greatest possible access to environmental amenities.

The remainder of this article will be divided into three principal sections. First, I will describe the role of tourism in the current Cuban economy and identify the environmental concerns this development poses. In particular, this analysis will explore the environmental justice concerns of Cuba's emerging tourist infrastructure. Second, the article will examine both practical and theoretical efforts to include claims for freedom of access to environmental benefits under the environmental justice rubric. The article will both examine the relevance and lessons of those efforts for Cuba and do

chemical contamination of waterways and soil" after the collapse of the Soviet Union); Yuliya Mitrofanskaya & Daulet Bideldinov, *Modernizing Environmental Protection in Kazakhstan*, 12 GEO. INT'L ENVTL. L. REV. 177, 181-84 (1999) (recounting the lasting effects of the Soviet Union's environmental policy on Kazakhstan); Frank W. Carter & David Turnock, *Problems of the Pollution Scenario*, in ENVIRONMENTAL PROBLEMS IN EASTERN EUROPE 188 (Frank W. Carter & David Turnock eds., 1993) (exploring Eastern Europe's air, water, soil, vegetation, and noise pollution crisis, and calling for a "European' approach to pollution control").

² SERGIO DÍAZ-BRIQUETS & JORGE PÉREZ-LÓPEZ, CONQUERING NATURE: THE ENVIRONMENTAL LEGACY OF SOCIALISM IN CUBA 37 (2000).

³ See, e.g., INTERNATIONAL BANK FOR RECONSTRUCTION & DEVELOPMENT, REPORT ON CUBA: FINDINGS AND RECOMMENDATIONS OF AN ECONOMIC AND TECHNICAL MISSION 91-94 (1951) [hereinafter WORLD BANK REPORT ON CUBA].

⁴ A form of "self-mastery." See *infra* note 42-50 and accompanying text.

so with reference to notions of liberty rather than equality—the standard principle on which environmental justice claims are advanced. This section will conclude by examining other arguments that might be used to support access to environmental amenities. Third and finally, the article will sketch out some suggestions that might be used for Cuba to ensure liberty of access to environmental benefits as part of a broader environmental justice effort. In doing so, the article largely rejects a view of Cuban exceptionalism—the notion that, by virtue of its fierce adherence to an official socialist ideology (and its defiance of the United States), Cuba's dilemmas are different from those faced by other nations in the Caribbean and in Latin and South America generally.

At the outset, it is also necessary to acknowledge that not everything in this article can adhere to the rigorous standards of proof usually demanded for academic writing. Due largely to the fraught and complicated U.S.-Cuban relationship, reliable sources are hard—and few—to come by. As a result, the scholar operates in a research universe of partial fact and educated inference. In short, we do the best that we can in a climate of mutual suspicion and, often, outright distrust.

I. TOURISM IN CUBA TODAY AND ITS ENVIRONMENTAL JUSTICE IMPLICATIONS

As most commentators on Cuba note, the collapse of the Soviet Union was a watershed event in the history of the communist state.⁵ Simultaneously, Cuba lost markets for its major export products—particularly sugar—and it lost agricultural and other subsidies central to the functioning of its society.⁶ This led to the beginning of the “Special Period in Peacetime,”⁷ essentially putting the island nation on a wartime footing confronting as an enemy its own shattered economy, the exceptionally undiversified product of centuries of colonial domination. As a consequence, the nation desperately undertook a program of economic diversification. Unsurprisingly, given its natural beauty and its Caribbean location, the nation embarked on a plan to develop its tourist infrastructure. To this end, it identified foreign partners to assist in the construction of luxury tourist resorts,⁸ and it began more aggressively

⁵ See, e.g., MINOR SINCLAIR & MARTHA THOMPSON, OXFAM, CUBA: GOING AGAINST THE GRAIN: AN OXFAM SPECIAL REPORT 3 (2001) (noting that following the collapse of the Soviet Union, in the absence of foreign exchange, Cuba nearly suffered a total collapse).

⁶ See, e.g., Carmen Diana Deere, *Cuba's National Food Program and Its Prospects for Food Security*, 10 AGRIC. & HUM. VALUES 35, 45-46 (1991); Carmen G. Gonzalez, *Seasons of Resistance: Sustainable Agriculture and Food Security in Cuba*, 16 TUL. ENVTL. L.J. 685, 706 (2003) (describing the effect of the Soviet Union's collapse on Cuba's ability to access products fundamental for the life of the people and prescribing recovery measures).

⁷ See, e.g., Carmen Diana Deere et al., *The View from Below: Cuban Agriculture in the “Special Period in Peacetime,”* 21 J. PEASANT STUD. 194 (1994).

⁸ José Mena Álvarez, *El Sector del Turismo en Cuba: Diagnóstico y Proyecciones*, 2 PLANIFICACIÓN FÍSICA—CUBA 5, 5 (2001).

marketing itself abroad. These investments have paid off: tourism is now Cuba's largest source of hard currency revenues.⁹

Tourists come to the island for a variety of experiences. Some come to visit the crumbling splendors of La Habana Vieja or smaller cities like Santiago de Cuba. Many seek to combine this more urban experience, however, with the standard fare of a Caribbean vacation, namely time on the beach.¹⁰ Others combine these activities with forays into the relatively unspoiled Cuban interior. For the keen environmentalist, Cuba offers endless opportunities as the "most ecologically diverse island in the Caribbean."¹¹

Cuba is also notable for the comparatively high education levels of its population.¹² It is, therefore, perhaps equally unsurprising that, despite the lack of a tourist infrastructure geared toward the needs and interests of tourists from more industrialized nations, in short order, Cuba put its considerable intellectual resources and human capital to work and began, in the mid-1990s, to accommodate these interests.¹³ That is, one can now stay at luxury hotels in Old Havana, luxuriate in four-star comfort on white sand Caribbean beaches, or visit an interior rainforest preserve accommodated in the rustic luxury (if that is not an oxymoron) among the treetops.

Cuban citizens cannot, however, do these things—at least not at the new resorts. A couple of anecdotes illustrate the scope of the problem. While in Cuba for a conference in August 2002, our group of environmental law professors and public interest environmental attorneys received a briefing about the development of this new infrastructure on the island's pristine, twenty-mile stretch of beach and coral reef called Cayo Coco—off the northern coast. The tourism minister emphasized the extensive environmental safeguards authorities were requiring for this project, so that

⁹ *Id.* at 7.

¹⁰ One of the less savory aspects of this "sun and fun" tourism is a healthy trade in sex tourism. See, e.g., Elisa Facio et al., *Tourism, Gender, and Globalization: Tourism in Cuba During the Special Period*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 119 (2004); Elisa Facio et al., *Gender, Work and Family in Cuba: The Challenges of the Special Period*, 18 J. DEVELOPING SOCIETIES 18, 32-58 (2002).

¹¹ Daniel J. Whittle et al., *International Tourism and Protection of Cuba's Coastal and Marine Environments*, 16 TUL. ENVTL. L.J. 533, 534 (2003).

¹² The U.S. Central Intelligence Agency reports a total literacy rate of 97%. CENTRAL INTELLIGENCE AGENCY: WORLD FACTBOOK, available at <http://www.cia.gov/cia/publications/factbook/geos/cu.html#people> (last visited Aug. 31, 2004). The United Nations Educational, Social and Cultural Organization's (UNESCO) 2000 World Education Report shows that Cuba spends 6.7% of its GNP on public education (as of 1996). UNESCO, WORLD EDUCATION REPORT 2000, app. II, tbl. 10 (2000), available at <http://www.unesco.org/education/information/wer/WEBtables/Ind10web.xls> (last visited Aug. 31, 2004).

¹³ This is not to say that Cuba did not have a tourist infrastructure at all prior to the Special Period. At least as far back as 1986, the nation began to invest in hotel construction for use by foreigners. See Álvarez, *supra* note 8, at 6.

it would remain pristine for generations to come.¹⁴ Like other such projects, it would be subject to the rigorous environmental review provisions of the new Law 81.¹⁵ I asked if Cubans were permitted to cross the stone causeway that links Cayo Coco to the mainland so that they, too, could enjoy its natural wonders in new, environmentally-sensitive tourist splendor. Somewhat abashed, the tourism minister told me they could not.¹⁶

Later the same week, a smaller group of us visited Las Terrazas, a magnificent ecological preserve in Pinar del Río province. The government had approved construction of an exquisite four-star lodge built into the hillside, weaving in and around the tropical forest canopy. The place was beautifully appointed and immaculate. It was also, the hotel manager explained, mostly below occupancy. We asked if Cubans were allowed to stay there, even at reduced rates, when occupancy was low. He explained that was not allowed.

Now one might write off these incidents. Anecdotes are, one might protest, inherently unreliable. Yet this anecdotal information came from Cuban officials—in the first instance from one of the highest-ranking tourism officials in the country. Although not declarations of official policy, they therefore, at a minimum, provide strong evidence of official policy.

Still, one might complain further, that to make anything of these instances is misguided. Cuba, with its extraordinary history, the defiant socialist holdout in Latin America, the nation that replaced post-colonial autocrats with a socialist dictator, is *sui generis*. Cuba walks a different path, some say. As a result, it must be judged by different standards.

To dismiss these incidents, however, would be a mistake. If nothing else, the Castro regime introduced greater access to some social benefits—health care and education most famously. Indeed, after the “triumph of the Revolution”—to use the stock Cuban rhetorical phrase—1959 was understood to signal a “new conception” of tourism in Cuba. In particular, the new socialist government realized “access for all the people to the valuable resources (fundamentally the beaches)”¹⁷ So, it is striking that once

¹⁴ Norman Medina, Briefing at the Colloquium on Environmental Law and Sustainable Development in a Twenty-First Century Cuba (Aug. 14, 2002).

¹⁵ See Law 81/97 (1997) (Cuba); MINISTERIO DE CIENCIA TECNOLOGÍA Y MEDIO AMBIENTE (CITMA) [CUBAN MINISTRY OF SCIENCE, TECHNOLOGY, AND THE ENVIRONMENT], PRINCIPALES RESOLUCIONES PROMULGADAS DESPUÉS DE LA LEY 81 [Principal Resolutions Promulgated Since Law 81] (June 2001) (reprinting resolutions implementing the ambitious aims of Law 81 with respect to particular environmental media) (copy on file with author).

¹⁶ Medina Briefing, *supra* note 14.

¹⁷ Álvarez, *supra* note 8, at 6. “El año 1959 señala una nueva concepción del turismo en nuestro país. Con el triunfo de la Revolución se promueve el turismo nacional, se viabiliza el acceso de todo el pueblo a los valiosos recursos (fundamentalmente las playas)” [“The year 1959 brought with it a new conception of tourism in our country. The triumph of the Revolution served to promote national tourism, giving every city access to valuable resources (fundamentally the beaches).”] *Id.*

aspects of the environment were commodified—turned into defined benefits with a monetary value to the state—the socialist nation's citizens were excluded. In other words, the moment Cuba starts looking less like a unique case and more like, say, Puerto Rico, merits our attention. Put another way, it would contravene the hard-won goals of the Cuban Revolution to turn Cuban national resources into the playgrounds of U.S. and European visitors—Cuba as a client state not of the United Fruit Company or of sugar interests, but of Club Med, Hilton, Hyatt, Marriott, and Sofitel.

Admittedly, there exist ready rationales for the exclusion of Cuban nationals. First, as in the former Soviet Union, it is quite likely that the state does not want to permit too much local access to foreigners, to protect foreigners from harassment (the state wants them to have a hassle-free visit, unmarred by the encounters that in the past have plagued tourist visits to some developing nations),¹⁸ and possibly to perpetuate Cuba's comparative isolation from the rest of the world and its opportunities. This, in any case, is the claim of the Cuban exile community.¹⁹

In addition, Cuba needs the foreign exchange money that foreign tourists bring, and ordinary Cubans cannot provide. The tourism official might say that until they can pay full price, the nation's citizens simply cannot be allowed entry in the interests of the nation's long-term economic health, and even when a facility is under occupancy, additional visitors bring wear and tear and defeat the purpose of the investment.

Moreover, as in any part of the world, Cuban authorities are keenly aware that finding the right balance between environmental protection and tourist access is a tricky business. As a result, by 2001 Cuban authorities designated fifty zones for the possibility of receiving support as for *el turismo de naturaleza*—nature tourism, or what we would call ecotourism.²⁰ In total,

¹⁸ See, e.g., Carla Gowen McClurg, *The International Year of Ecotourism: The Celebration of a New Form of Colonialism*, 34 MCGEORGE L. REV. 97, 127-28 (2002) (discussing "enclave" tourism designed to protect tourists and locals from one another); Kristin Roberts, *How to Smooth Caribbean's Rough Edges?*, ORLANDO SENTINEL TRIB., Oct. 30, 2002, at C3 (reporting on efforts to address problems of tourist-local interaction).

¹⁹ "Cuba se ha ido transformando en cada vez más isla. El aislamiento informativo y el bombardeo a toda hora con consignas vacías pero muy bien concebidas ha llevado a todo un pueblo (con sus escasas y muy honrosas excepciones) a idiotizarse." ["Cuba is constantly being transformed into more of an island. This information isolation and constant bombardment with empty slogans but well conceived has led everyone (with some rare and honorable exceptions) to make idiots of themselves."] CUBAN AMERICAN NAT'L FOUND., at <http://www.canf.org/es/noticias%20de%20cuba%20centro.htm> (last visited Aug. 31, 2004). In fact, Cuban law works in different ways to control the interaction of ordinary Cubans with foreigners. See, e.g., Matias F. Travieso-Diaz & Charles P. Trumbull IV, *Foreign Investment In Cuba: Prospects And Perils*, 35 GEO. WASH. INT'L L. REV. 903, 925-26 (2003) (describing aspects of labor law controlling employment of Cuban nationals).

²⁰ There is considerable debate about whether ecotourism and "nature tourism," another possible translation here, are in fact the same thing. Some maintain that ecotourism "is a form of tourism inspired primarily by the natural history of an area" while nature tourism "is akin to leisure travel in which one happens to participate in outdoor activities." Michele Zebich-Koss,

these fifty zones account for nearly 13,000 square kilometers.²¹ The State Institute of Physical Planning estimates that these fifty zones can together accommodate 7,700 tourists a day. At the same time, however, as of 2001 they had only 2,700 rooms for both foreign and domestic visitors; although authorities expressed plans to increase this by another 5,600 rooms in thirty-three of the fifty zones, no date was given for meeting this goal.²² At a minimum, these figures demonstrate that if Cuba's short-term goal is to guarantee hard currency revenues, parity of access to natural sites is problematic. In the case of ecotourism, because the market is especially attractive, it is all the more necessary to protect the state's investment. According to the Washington, D.C.-based International Ecotourism Society, ecotourists are better educated and spend more than average tourists.²³ If the exponential ecotourism boom elsewhere in Latin America is any indication, Cuba is right to want to cash in on this market.²⁴

To some extent, furthermore, there is an irrefutable logic to distinctions between tourist access for foreigners and nationals. Cuba does need hard currency, and tourism is the most obvious means to achieve that in a world with depressed sugar prices,²⁵ depriving the country of its traditional source of economic security. But the distinction raises concerns as well. Specifically, practices once founded on a sensible justification or an immediate, pressing need can calcify and morph into systematic exclusions.²⁶ In Cuba's case, the exclusion of its citizens from portions of the island's spectacular setting, to say nothing of exclusion from the amenities created to allow people to

Ecotourism, Economic Development and the Environment in Latin America: A Policy Perspective, in ENVTL. POL'Y & DEV. NATIONS 245, 246-47 (Stuart S. Nagel ed., 2002). 1

²¹ Telmo Ledo Llanes, *El Turismo de Natureleza en Cuba*, 1 PLANIFICACIÓN FÍSICA—CUBA 46, 50 (2001).

²² *Id.*

²³ INT'L ECOTOURISM SOC'Y, *Ecotourism Statistical Fact Sheet 2* (2000), available at <http://www.ecotourism.org/research/stats/files/stats.pdf> (last visited Sept. 10, 2004).

²⁴ For example, visitors to protected areas in Peru increased 250% from 1990-1999; in Brazil, a country that has seen a five-fold tourism increase for the same period, in 1998 alone, 3.5 million visitors are estimated to have gone to visit national parks. *Id.* Some participants in the ecotourism industry question the reliability of any statistical claims, however. See Ron Mader, *Latin America's Ecotourism*, GLOBAL J. PRAC. ECOTOURISM, at <http://www.planeta.com/ecotravel/tour/latam.html> (last visited Aug. 31, 2004).

²⁵ See, e.g., Joy Powell, *Sugar Beet Farmers on the Defensive*, STAR TRIB. (Minneapolis), Dec. 17, 2003, at 1 (reporting that U.S. sugar prices were nearly three and a half times higher than depressed world prices because of U.S. price supports).

²⁶ For example, as Alice Kaswan observes, what may have been inattention to, lack of interest in, and ignorance of minority concerns in the early years of the U.S. environmental movement, over time, likely produced significant inequalities in the distribution of environmental burdens and access to environmental amenities. See, e.g., Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 223 (1997) [hereinafter *Bridging the Gap*]. See also Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 8 (1998) ("[P]rivileged white people systematically receive the benefits of environmental protection while poor people of color systematically incur the environmental risk.").

experience such areas comfortably, poses troubling environmental justice concerns. An environmental justice claim, as most people are now aware, refers to the assertion that no community or individual should be unequally burdened with environmental harms or benefit disproportionately from environmental amenities.²⁷ In the case of Cuban tourism, the focus in this means that Cuba's new tourism infrastructure creates disproportionate benefits for foreign visitors.

As noted above, I largely reject claims of Cuban exceptionalism. That is, while the particular context in which this situation has developed (specifically the enduring socialist political system of Castro's Cuba) is unique in the Americas, the exclusion of national citizens is not. One need only think, for example, of the routine practice of hotels in Mexican Caribbean resorts, in places like Cancún and Puerto Vallarta, of shooing away locals from its "private" beaches,²⁸ to recognize that these disparities exist. Their source may be different (a struggling economy's need for cash versus privatized coastal resorts), but the effect in distributional terms—and access to environmental amenities—is similar. In particular, as Cuba faces the inevitability of new leadership and possible regime change, including the possibility of a lifting of the U.S. embargo, it is timely to consider, therefore, how best to address these environmental benefits inequities.

II. PROVISION OF ENVIRONMENTAL BENEFITS FOR ENVIRONMENTAL JUSTICE

Most U.S. environmental justice scholarship makes a reflexive bow to, for example, "[t]he growing perception that environmental benefits and burdens have been inequitably distributed"²⁹ However, this analysis largely proceeds to discuss only the burdens and, in particular, to focus upon controversies involving the sting of operations associated with potential environmental harms.³⁰ Indeed, despite the production of a now considerable body of environmental justice literature,³¹ one is hard-pressed to find even a small portion of it devoted to distributive questions as they relate to environmental amenities.

²⁷ See, e.g., Alice Kaswan, *Distributive Justice and the Environment*, 81 N.C. L. REV. 1031, 1035-36 (2003) (noting minority groups' concerns, at the emergence of the "environmental justice" movement, over their disproportionate exposure to environmental harms and over the unfair distribution of such harms).

²⁸ See, e.g., Mark Stevenson, *Resorts Cut Mexicans Off From Own Beaches*, LAREDO MORNING TIMES, Dec. 13, 1998, at 17A (reporting that nearly every inch of Mexico's 550-mile Caribbean coast down to Belize is privately owned, mostly by foreigners).

²⁹ See, e.g., *Bridging the Gap*, *supra* note 26, at 222.

³⁰ *Id.* at 280-82.

³¹ A decade ago, Robert W. Collin, in noting the exponential growth of legal scholarship on environmental justice, discussed historical development surrounding the term "environmental justice." Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 J. ENVTL. L. & LITIG. 121, 122 (1994).

A notable exception is the work of Samara Swanston, which stresses the need to examine environmental benefits in the environmental justice context.³² As Swanston notes, "environmental justice is, at its most basic level, about land."³³ In this connection, she traces Native American beliefs that "the political, social and cultural life of Native American communities is inextricably linked to environmental health, because environment is not something 'out there,' but something deep within each of us"³⁴ She further observes that for other U.S. communities of color, notably African Americans, "even before [they] challenged segregated education or anti-miscegenation laws, they brought lawsuits to gain access to parks and waterfronts, seeking to enjoy environmental quality benefits and the benefits of nature."³⁵

Swanston's observations help focus on essentials. Specifically, they direct attention to the need for environmental law both *to protect from* harm, but also to assist in the effort *to provide for* a level of environmental quality and enjoyment of environmental benefits. This is to endorse, in the context of environmental lawmaking, consideration of a notion akin to Isaiah Berlin's famous dichotomy between "negative" and "positive" liberty.³⁶

A. Two Concepts of Liberty and Environmental Justice

It might seem odd, in the context of environmental justice, to speak of "liberty" as an essential value at all. As Berlin himself noted, one must be cautious not to confound "liberty with her sisters, equality and fraternity."³⁷ That is, liberty potentially compliments but sometimes competes for recognition in a universe of pluralistic goals:

The bulk of humanity has certainly at most times been prepared to sacrifice this [liberty] to other goals: security, status, prosperity, power, virtue, rewards in the next world; or justice, equality, fraternity, and many other values which appear wholly, or in part, incompatible with the attainment of the greatest degree of individual liberty, and certainly do not need it as a pre-condition for their own realization.³⁸

In the United States, environmental justice debates have focused largely on claims for equality as a guiding principle and, in particular, for that subset

³² Samara F. Swanston, *Environmental Justice and Environmental Quality Benefits: The Oldest, Most Pernicious Struggle and Hope for Burdened Communities*, 23 VT. L. REV. 545, 545 (1999).

³³ *Id.* at 546.

³⁴ *Id.* at 547 (internal citation omitted).

³⁵ *Id.* at 547.

³⁶ Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERTY* 166 (Henry Hardy ed., 2002) (1958).

³⁷ *Id.*

³⁸ *Id.* at 207.

of equality, distributive justice.³⁹ That focus has generally been true of non-U.S. debates about environmental justice as well.⁴⁰

Thus, it should be recognized at the outset, "liberty" is not the lens through which environmental justice questions are usually examined. The standard environmental justice complaint seeks, for instance, to prevent overburdening identifiable racial, ethnic minority, or low-income communities from bearing more than their share, that is, of being unequally burdened with an undesirable land use, such as a landfill.⁴¹ Nonetheless, the concept of liberty can shed light on exactly what is at stake in the use and management of Cuban national resources, and in particular, those resources now being exploited for tourism (not to mention those ripe for tourism "development"). In particular, it is worth asking what case might be made for asserting the importance of liberty interests in a discussion of environmental justice.

To this end, Berlin's celebrated distinction proves helpful. In Berlin's characterization, "negative" liberty refers, in its most extreme formulation, to the classic liberalism of John Stuart Mill—to the idea that one is "free to the degree to which no man or body of men interferes with [one's] activity."⁴² This notion is more complicated, however, than it may seem at first glance. As Berlin explained further, Mill, for one, confused two separate concepts.

One is that all coercion is, in so far as it frustrates human desires, bad as such, although it may have to be applied to prevent other, greater evils; while non-interference, which is the opposite of coercion, is good as such, although it is not the only good. . . . The other is that men should seek to discover the truth, or to develop a certain type of character of which

³⁹ See, e.g., *Bridging the Gap*, *supra* note 26, *passim* (arguing government responsibility to impose distributive justice because other models, including "community preferences" model and unfettered "market" model, are unable to insure equal protection with respect to distribution of environmental harms); Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COLO. L. REV. 387 (1999) (examining potential use of environmental laws to assert equal protection claim under U.S. Constitution); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U.L. REV. 787 (1992) (exploring "distributional side of environmental protection" and role of environmental justice in making environmental policy).

This is not to suggest however, that legal claims based on the Equal Protection Clause or other equality theories have succeeded. See, e.g., LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* 64 (2001) (describing the difficulty of establishing intentional discrimination in the Equal Protection context).

⁴⁰ Ruixue Quan, *Establishing China's Environmental Justice Study Models*, 14 GEO. INT'L ENVTL. L. REV. 461 (2002).

⁴¹ See, e.g., COLE & FOSTER, *supra* note 39.

⁴² "I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others." Berlin, *supra* note 36, at 169.

Mill approved—critical, original, imaginative, independent, non-conforming to the point of eccentricity, and so on—and that truth can be found, and such character can be bred, only in conditions of freedom.⁴³

Furthermore, Berlin elaborates, the notion of negative liberty is both modern and one “principally concerned with the area of control, not with its source.”⁴⁴ That is, what matters is not—using language Berlin does not—the *form* of regime that controls the individual, but, rather, whether the regime leaves to individuals the largest possible “measure of personal freedom.”⁴⁵ In other words, the focus of negative freedom is the ability of the individual to be at liberty and not on democratic rule or some other form of self-government.

“Positive” liberty, in Berlin’s formulation, requires a form of government that can lead to self-rule over a self that exists in and is dependent upon membership in a larger whole. Positive liberty, therefore, is very much about self-government: “[t]he ‘positive’ sense of the word ‘liberty’ derives from the wish on the part of the individual to be his own master.”⁴⁶ Positive liberty seeks to answer the questions, “[w]hat, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?”⁴⁷ Importantly, this self is not, for Berlin, the self of unbridled passions and satisfaction of merely selfish ends:

[T]he real self may be conceived as something wider than the individual . . . as a social “whole” of which the individual is an element or aspect: a tribe, a race, a church, a state This entity is then identified as being the “true” self which, by imposing its collective, or “organic”, single will upon its recalcitrant “members”, achieves its own, and therefore their, “higher” freedom.⁴⁸

As Berlin concludes,

[W]hat gives such plausibility as it has to this kind of language is that we recognize that it is possible, and at times justifiable, to coerce men in the name of some goal (let us say, justice or public health) which they would, if they were more enlightened, themselves pursue, but do not, because they are blind or ignorant or corrupt.⁴⁹

⁴³ *Id.* at 175.

⁴⁴ *Id.* at 176.

⁴⁵ *Id.*

⁴⁶ *Id.* at 178.

⁴⁷ Berlin, *supra* note 36, 169.

⁴⁸ *Id.* at 179.

⁴⁹ *Id.* There is a danger of paternalism here, as Berlin goes on to discuss. *Id.* at 179-81.

With respect to the question of Cuban popular access to national resources like beaches and interior rainforests, the distinction is instructive. That is, the response I heard when I pressed Cuban officials on whether the public was permitted to visit its tourist sites may be characterized as one rooted in a notion of "positive" liberty. "[M]y 'lower' nature," the pursuer "of immediate pleasures, my 'empirical' or 'heteronomous' self" wants to romp with abandon on white sand beaches and lounge for days in the treetops of a luxury ecotourist resort, but my "true' self," represented in the Cuban context by the State speaking for the "whole" of which the individual is an element or aspect,"⁵⁰ knows better: I must be coerced not to indulge my passions so that the nation's economy can recover, so that others may again eat well and have promising careers.

This argument is not without power and logic. In Cuban history, it contains part of the justification for the post-revolutionary property appropriation and redistribution so that an impoverished and malnourished majority could eat well and have access to better health care and education.⁵¹ In the context of the management of environmental amenities, however, there exist at least two problems with this argument. The first of these, of course, is that this view can lead "to despotism, albeit by the best or the wisest"⁵² That is, if the issue is one involving an imminent threat—to public health or safety, for example—the choice of those who speak for the "whole" may constitute a defensible exercise of the notion of positive liberty. When, however, the situation is not one of imminent threat, but, rather, enjoyment and profit from a common resource, the benevolence of this despotism is less clear. As Berlin (the specter of Soviet-era Communist governments likely directing his thoughts) notes:

If the tyrant (or "hidden persuader") manages to condition his subjects (or customers) into losing their original wishes and embrace ("internalize") the form of life he has invented for them, he will, on this definition, have succeeded in liberating them. He will, no doubt, have made them *feel* free But what he has created is the very antithesis of political freedom.⁵³

The second problem with a positive liberty defense for access to environmental amenities is that such a position neglects the role of extra-social forces in setting the ground rules for access. The challenge of positive liberty, after all, is in knowing the correct answer to this question: "Where is the frontier that lies between my (rationally determined) rights and the

⁵⁰ *Id.* at 179.

⁵¹ WORLD BANK REPORT ON CUBA, *supra* note 3, at 442 (noting that, prior to the revolution, malnutrition rates in Cuba ranged from 40%-60%).

⁵² Berlin, *supra* note 36, at 200.

⁵³ *Id.* at 186.

identical rights of others?"⁵⁴ Tourism in a global economy, however, significantly distorts the aspiration of a society's members to identify their "identical" and "rationally determined" rights. A non-Cuban joint partner engaged in developing a beach resort, for example, is interested in lowering boundaries to capital flows but not necessarily in providing opportunities for resource access. Yet both goals are rational. Moreover, the difference in interests can only disadvantage individuals whose "true" choices are being selected by the state, since the foreign venture partner will, rationally, choose not to participate if it cannot be assured that it is likely to earn a specified return on its investment, a prospect that may be hampered by assurances that its facilities will be open to locals as well as monied foreign visitors.

A further difficulty here involves the permanent consequences of action. Suppose, for example, the state, acting on behalf of the "whole" of our collective "true" selves, decides to appropriate resources to provide health care, even though the citizenry says that it would rather use the money for gambling. In the long run, the citizenry is likely to benefit and may even agree that the state's choice was a sound one, recognizing that the citizenry erred when once "blind or ignorant or corrupt."⁵⁵ However, once the power to disturb and manage the physical environment is in the hands of others who have no continuing interest in the preservation of the resource (because they do not have a majority financial stake, or because it is not their country), the situation is rather different. Once altered, the previous condition cannot be restored.⁵⁶ That is, the development, for instance, of Cuba's incomparable natural resources risks losing what the "true" self likely would seek to protect, namely liberty of access to the island's environmental resources prior to their exploitation and degradation.

The positive liberty defense of the Cuban government's management of its national, natural resources then is, in the end, unconvincing. Is negative liberty more likely to promote an environmentally just result? In one sense, negative liberty is more promising if the environmentally-just goal is access to national resources. Again, negative liberty does not require a particular form of government for its execution; it is not a principle directed to defend a democratic republican rule in a late capitalist society like the United States. Indeed, it is worth recalling here "that liberty in this sense is not incompatible with some kinds of autocracy, or at any rate with the absence of self-government."⁵⁷ Thus, negative liberty might be used to assert that the role of the state is to ensure the possibility of access. The application of the

⁵⁴ *Id.* at 191.

⁵⁵ *Id.* at 179.

⁵⁶ By saying this, I am not endorsing the "balance of nature" hypothesis but, rather, recognizing that alteration means change and that it is nearly impossible to restore something to its previous condition. See Daniel B. Botkin, *First Annual Cummings Colloquium on Environmental Law: Beyond the Balance of Nature: Adjusting Law to Nature's Discordant Harmonies*, 7 DUKE ENVTL. L. & POL'Y F. 25 (1996) (rejecting "balance of nature" beliefs as "myth").

⁵⁷ Berlin, *supra* note 36, at 176.

notion of negative liberty in this context might be to say that members of the society may not be kept from the resource, because this is a form of coercion. What is more, the possibility of access to national natural resources would also promote that other aim of negative liberty, namely to allow the individual to develop his or her critical faculties and imagination—a traditional reason to experience the natural world.⁵⁸

From the point of view of the state, of course, the disadvantage of negative liberty, as applied to the question of natural resources and access to environmental amenities is that any such access is bound to reduce resources available to the state in other forms, and most specifically in the form of capital. For example, one of the Cuban resorts I visited was not at capacity at the time we visited, but it likely will be some day. If the resort's management were forced to juggle the competing use demands of citizens and foreigners, it is almost certain that the revenues from nationals would not match the sums available from non-Cubans alone. That, however, is no reason not to explore means to apply the notion of negative liberty to the context of Cuban tourism and environmental protection. Put another way, there may be some mechanism for balancing capital-generating access by foreigners giving locals liberty of access at reduced rates. The capital return would be lower, but other interests of access would, thus, also be served.

B. Other Approaches

Carol Rose provides another way of thinking about the problem Cuba faces as it begins to limit popular access to certain national property. In a 1996 article, at a time when socialist political systems and economies were rapidly disappearing or changing, Rose evaluated the role of property rights. She observed that, in actuality, establishing property rights involves more than implementing a regime that preserves individual autonomy and assists in wealth creation.⁵⁹ Instead, she argued, property may in fact be based upon "fragile" arguments, "arguments [that] may arise because property itself is

⁵⁸ The notion that the experience of nature serves this function is deeply rooted in our tradition, going back at least to the Enlightenment. See, e.g., JEAN-JACQUES ROUSSEAU, *THE CONFESSIONS* 158 (J.M. Cohen, trans., Penguin Classics 1953).

The sight of the countryside, the succession of pleasant views, the open air, a sound appetite, and the good health I gain by walking, . . . all these serve to free my spirit, to lend a greater boldness to my thinking, to throw me so to speak, into the vastness of things, so that I can combine them, select them, and make them mine as I will, without fear or restraint.

Id. This strain runs deep in our national thinking. On the connection between liberty and the environment, see, e.g., William A. Shutkin, *The Concept of Environmental Justice and a Reconception of Democracy*, 14 VA. ENVTL. L.J. 579, 581 (1995).

⁵⁹ Carol M. Rose, *Propter Honoris Respectum: Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996).

fragile A central feature of this fragility is this: property entails the cooperation of others. You cannot have property all alone.”⁶⁰

Rose’s words merit reflection as Cuba faces the transition to a mixed economy, one both socialist and capitalist and, perhaps, in a post-Fidel world, the transition to a state where increased private enterprise is allowed. As noted above, developments like exclusive tourist venues created to produce hard cash can over time lose sight of original principles, and merely harden separations by category—class and race, for example.⁶¹ In the process, property can be distorted and create new social tensions—because the key, cooperative ingredient Rose notes is missing.

This is not to say that exclusivity is advanced in conscious service of inequality. In the U.S. example, “[t]here is little evidence that early [twentieth-century] environmentalists’ interest in conservation was generally borne of hostility to minorities or the poor.”⁶² Nonetheless, comparatively privileged, conservation-focused environmentalists had little understanding of the need, for example, of the poor to hunt for sustenance. Similarly, “[i]ssues such as water quality, air quality, noise, and other urban problems that are now considered ‘environmental’ were not within the purview of the environmental movement as it understood itself during the first half of the [twentieth] century.”⁶³

The case of Cuba presents a lesson here of ground captured that could again be lost, and literally so. That is, to the extent that the Revolution committed itself to equality of access to natural resources, the new tourist apartheid could, if it becomes an entrenched feature of the society, become Cuba’s new normal. With only forty-four years of socialist government and, before that, a period nearly ten times as long of colonial domination, it is not hard to imagine that this could occur. What could also be lost sight of, then, is the cooperative aspect Rose points to in a well-functioning regime, the reality that “[a] property regime thus depends on a great deal of cooperation, trustworthiness, and self-restraint among the people who enjoy it”⁶⁴ The modern, post-revolutionary Republic of Cuba perhaps moved too far from the individual autonomy side of the property ownership continuum to the collective end for its property regime to continue effectively. Paradoxically, the example of its new tourist apartheid suggests, it now risks swinging back to its original, equally unstable position.

In the process, moreover, the Cuban state risks renouncing what one might call (if somewhat anachronistically) the environmental goals of the Revolution. Cuba’s far-reaching 1997 environmental review law, Law 81 on

⁶⁰ *Id.* at 363.

⁶¹ *Bridging the Gap*, *supra* note 26, at 241.

⁶² *Id.* at 257.

⁶³ *Id.* at 257-58.

⁶⁴ Rose, *supra* note 59, at 363.

the Environment, had as one of its objectives, according to the Justice Ministry, the aim "to indicate suitable ways to preserve and to develop the environmental gains of the Revolution" ⁶⁵ Furthermore, among the principles that the Ministry understands as supporting environmental work in Cuba is "the active participation of all social actors, as much in the central [national] as in the local level." ⁶⁶ In addition, the Ministry insists that it wishes to form *una conciencia ambiental*, ⁶⁷ an environmental consciousness. Taken together, these views arguably provide support for equal access by Cubans to the country's national, natural resources.

III. ENSURING LIBERTY OF ACCESS

The task for Cuba may be, then, to define an environmental management regime located in the middle, between an extreme version of property that institutionalizes exclusion from the country's prime ecotourist locations on the one hand, and the claim, on the other, that in the post-revolutionary era, the island nation opened its natural resources for use and enjoyment of all of its citizens. To define the contours of that regime, it is helpful to identify efforts to ensure access to environmental amenities. Even accounting for differences in history and national circumstance, a couple of U.S. examples may provide a useful analytical starting point in this regard.

A. U.S. Examples

Both examples come from New York City—the first from its environmental benefit programs (EBPs). Residents of the Greenpoint/Williamsburg section of Brooklyn, for example, "had complained for years about the Newtown Creek Sewage Treatment Plant and the industrial facilities that coexisted there." ⁶⁸ As a result of their lobbying, "[i]n 1990, New York City signed a consent order with New York State that stipulated an \$850,000 sum for the Environmental Benefits Program in addition to substantial improvements to the plant." ⁶⁹ The program, overseen by the New York City Department of Environmental Protection, includes cooperation with a Community Advisory Committee. The idea, in sum, was to foster "community-based efforts addressing issues beyond the environment"

⁶⁵ ÁNGEL FERNÁNDEZ-RUBIO LEGRÁ, MINISTERIO DE JUSTICIA (HAVANA), LEY 81/97 DEL MEDIO AMBIENTE EN MÁS DE 150 PREGUNTAS Y RESPUESTAS [MINISTRY OF JUSTICE (HABANA), LAW 81/97 ON THE ENVIRONMENT IN MORE THAN 150 QUESTIONS AND ANSWERS] 48 (1999).

⁶⁶ *Id.* at 50 ("Participación activa de todos los actores sociales, tanto en el nivel central como local.").

⁶⁷ *Id.*

⁶⁸ MEGA-CITIES INNOVATIONS FOR URBAN LIFE, *NEW YORK CITY PROFILE*, at <http://www.mega-citiesproject.org/network/newyork.asp> (last visited Sept. 10, 2004).

⁶⁹ *Id.*

but involving the environment.⁷⁰ In other words, the Greenpoint/Williamsburg EBP aimed to achieve exactly the sort of cross-jurisdictional involvement and cooperation that the Cuban Ministry of Justice maintains its environmental law aspires to do.

The focus of the Greenpoint/Williamsburg EBP, however, was principally to get community input on and assistance in pollution prevention, rather than to insure access to environmental amenities. However, EBP funds were dedicated in part for remediation to improve local environmental quality,⁷¹ and efforts to obtain green and/or open space were some of the positive benefits local residents aimed to obtain.⁷²

Another celebrated New York example occurred in West Harlem, which became the site of a large sewage processing plant that, in addition to creating an olfactory nuisance, was alleged to have exacerbated the health problems of the local, largely Latin-American and African-American, residents.⁷³ In this instance, residents successfully brokered an agreement by which the City provided them amenities the neighborhood otherwise lacked—a swimming pool and a public park—directly on top of the treatment facility.⁷⁴

Notably, neither of these examples achieved equality of access or equality of resources. They can be said, however, to constitute an expression of the motive behind efforts to achieve negative liberty, namely “the desire to be governed by myself, or at any rate to participate in the process by which my life is to be controlled.”⁷⁵ Simultaneously, they can be viewed as an expression of a form of positive liberty in a world where many voices contribute to decide what our “true” selves would want.⁷⁶ As Ilene Gauna reminds us, it is essential to draw widely upon “community perspectives” to set environmental policy.⁷⁷ The need to include such perspectives is yet another reason to endorse the application of liberty as a justification for environmentally-just results in environmental decision making.

⁷⁰ *Id.*

⁷¹ Nancy E. Anderson, *Notes From the Front Line*, 21 FORDHAM URB. L.J. 757, 766-68; (1994); Jane Sweeney et al., MEGA-CITIES INNOVATIONS FOR URBAN LIFE, *Environmental Benefits Program New York City, U.S.A.* (Project Publication No. MCP-018G, 1998), at <http://www.mega-citiesproject.org/publications/environment.asp> (last visited Aug. 31, 2004).

⁷² Swanston, *supra* note 32, at 565.

⁷³ Vernice D. Miller, *Planning, Power and Politics: A Case Study of the Land Use and Siting History of the North River Water Pollution Control Plant*, 21 FORDHAM URB. L.J. 707 (1994).

⁷⁴ *Id.* at 711.

⁷⁵ Berlin, *supra* note 36, at 178.

⁷⁶ *Id.*

⁷⁷ See Ilene Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 41-70 (1998) (exploring obstacles to environmental justice created by “utilitarian pluralism” that drives most U.S. environmental regulation).

New York environmental justice activists also have long sought to insist on equal distribution of open and green space for communities of color in New York, under New York's Open State Conservation Plan, which is reviewed once every three years.⁷⁸ Pointing to general language in the state's official documents, which emphasizes the need to include all segments of society in the benefits of open space, these activists have pushed their environmental justice claims into a position of priority.⁷⁹ These claims have met little success.⁸⁰ In part, this failure may be because activists have pursued the claims in conjunction with appeals to equality, which are so often unsatisfactory bases for argument because, as the conservative writer James Fitzjames Stephens famously put it over a century ago,

It may be, and I think it is in a vast number of cases, nothing more than a vague expression of envy on the part of those who have not against those who have . . . All this is so vague and unsatisfactory that it is difficult to reduce it to a form definite enough for discussion.⁸¹

By contrast, claims for environmental justice based on liberty, whether negative or positive, may pose greater promise, because they appeal not to how we should feel towards one another, but instead focus on how each of us should be entitled to live. Swanston insists that: "a sharp eye must also be kept on the distribution of environmental benefits. Keep in mind the struggles of those who came before us, so that those who follow can perhaps enjoy the improved environmental quality that they need and deserve."⁸² The exhortation is a fairly typical one, and its sentiment admirable. But, given the essential self-interest that drives most of us, its other-regarding quality may contain the seed of its failure. For this reason, appeals to liberty may prove more compelling in environmental justice debates.

Given Cuban history since 1958, of course, it may be that appeals to the principle of equality may be more compelling in Cuba than in the United States. In this connection, another New York example may prove instructive for those concerned about Cuban access to environmental benefits. The example relates to the City's so-called "Fair Share" criteria.⁸³ Fair Share criteria endeavor to insure that locally-undesirable land uses (LULUs) are distributed evenly throughout the city, at least with respect to city-owned

⁷⁸ Swanston, *supra* note 32, at 555.

⁷⁹ *Id.* at 555-58.

⁸⁰ *Id.* at 565 ("Urban communities of color are not just shouldering an inequitable share of the burdens, they are subsidizing—if not paying the lion's share of—the cost of the benefits for advantaged communities.").

⁸¹ JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 124 (Stuart D. Warner ed., 1993) (1873).

⁸² *Id.* at 566.

⁸³ N.Y.C. CHARTER, ch. 8, § 203, at 75-76 (2004), available at <http://www.nyc.gov/html/charter/pdf/citycharter2004.pdf> (last visited Nov. 1, 2004).

property. Citizens have, in fact, had moderate success asserting claims on the basis of these criteria.⁸⁴ In Cuba, this might be a useful mechanism for two reasons. First, most property in Cuba is state-owned, so that Fair Share criteria—whether LULUs or environmental and land use amenities—could be designed to provide such explicit legal protection.⁸⁵ Second, as Cuba makes the transition from communist to quasi-free market state, Fair Share criteria could usefully help guarantee the populist aspects of Cuba's post-revolutionary approach to environmental protection. One must recognize, however, that key aspects of U.S. environmental justice analysis may not apply to non-U.S. experience. U.S. models tend to focus on race and ethnicity as the focal points for discrimination, because of the nation's history. But these categories may be less important elsewhere, where, for instance, the industry in which one works, regardless of whether one is a manual laborer or a senior manager, may be the relevant class meriting special protection.⁸⁶ In the Cuban example, as elsewhere, an income-based model may also be less than optimal, since a feature of the Revolution was greater income equality.⁸⁷ In short, this is to recognize that the strategy must be tailored to Cuban experience and realities.

B. Cuban Law and Beyond

Cuban environmental law has, since the commencement of the Special Period, made considerable strides both to provide a mechanism to repair the extensive environmental damage from its years as a Soviet client state, and also to implement measures that will better protect environmental resources in the future. Chief among these innovations is Law 81,⁸⁸ the "broad and far-reaching framework law" that "sets forth environmental objectives, establishes the administrative framework within which [state administrative] entities operate, and creates a set of legal instruments that agencies must use

⁸⁴ See, e.g., *Silver v. Dinkins*, 601 N.Y.S.2d 366 (Sup. Ct. N.Y. County 1993) (concluding that City's location of two piers violated Fair Share criteria).

⁸⁵ Nonetheless, this will not be as simple as one might suppose since some property is privately held, despite the fact that Cuba's economy is centrally-managed and most property is held by the state. See generally Carmen Diana Deere & Mieke Meurs, *Markets, Markets Everywhere? Understanding the Cuban Anomaly*, 20 WORLD DEV. 825 (1992).

⁸⁶ Quan, *supra* note 40, at 469 (arguing that differences of ethnicity, race, and even income are relatively insignificant in China, while occupation may be a more relevant concept for environmental justice analysis).

⁸⁷ See, e.g., DÍAZ-BRIQUETS & PÉREZ-LÓPEZ, *supra* note 2, at 38. This is not to say, however, that income inequality has not persisted since the Revolution. See Gonzalez, *supra* note 6, at 710. Moreover, the tourism industry is a leading generator of income inequality. See Marc Frank, *Cubans Purge Hotel Trade of Bad Habits*, FIN. TIMES (London), Jan. 8, 2004, at 2 (reporting popular dissatisfaction "at tourism industry privileges."). On the relevance of the income model in a Communist society, see Quan, *supra* note 40, at 463 ("[I]t is equally ineffective to explore environmental injustice merely by using an income-based model, especially if we begin by examining the environmental injustice situation in China from the time when the People's Republic of China was founded.").

⁸⁸ Ley 81/97 (Cuba) (1997).

to carry out their mandates.”⁸⁹ Among other things, Law 81 thus directs adherence to environmental land-use planning practices and observance of an environmental impact assessment (EIA) process.⁹⁰ Importantly, too, these environmental protections are to be followed in development projects that will bring foreign investment, pursuant to laws that aim to make foreign investment easier than during the period of Soviet influence.⁹¹ On paper at least, this is all well and good. The question, as always, is whether these new laws will be enforced. Moreover, and particularly if one advocates, as I have here, a principle of liberty of access for locals and citizens alike, insuring development that does not destroy the environment will not be easy. Most Cuban tourist development is occurring, not surprisingly, in coastal areas that are especially fragile. They are, furthermore, assaulted on all sides. Most visibly, they are challenged by “[t]he economic power and foreign exchange revenues that the tourism industry earns . . . powerful forces that work against environmental conservation and present significant challenges” to enforcement by environmental agency personnel.⁹² Conversely, aspects of the coastal environment, such as mangrove wood found in mangrove swamps, traditionally have been used by poor coastal residents “to produce charcoal by means of ‘charcoal ovens.’”⁹³ A liberty interest that aims to provide rich, foreign investors and poor, local residents alike access to the same resource clearly suggests, therefore, that reliance on the written protections of Cuban environmental law will not be sufficient to protect the resource. This begs the question, then, of how to insure access while also guaranteeing the preservation of that resource so that one would still want access.

C. International Protections for Environmental Justice in Cuba

Possibly applicable international legal commitments are highly general. Principle 3 of the 1992 Rio Declaration on Environment and Development, for instance, provides that “[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”⁹⁴ This articulation of the principle of “inter-generational equity” could be used to defend access to natural resources by a nation’s citizens, although it might equally be used to defend a decision to seek foreign capital to employ an underemployed population. The ambiguity inherent in such general commitments is true of other potentially relevant Rio Principles, for

⁸⁹ Whittle, et al., *supra* note 11, at 566.

⁹⁰ *Id.* at 566-67.

⁹¹ *Id.* at 568.

⁹² Daniel Suman, *Can You Eat a Mangrove? Balancing Conservation and Development in the Management of Mangrove Ecosystems in Cuba*, 16 TULANE ENVTL. L.J. 619, 645-46 (2003).

⁹³ *Id.* at 646.

⁹⁴ *Rio Declaration on Environment and Development*, U.N.Doc.A/CONF.151/26; 31 I.L.M.874 (1992), reprinted in DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY TREATY SUPPLEMENT 30 (2002).

example Principle 4, which states that “environmental protection shall constitute an integral part of the development process,” and Principle 8, which asserts that “States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.”⁹⁵ As with Principle 3, each of these commitments might be construed to defend a principle of popular access to natural resources. It might thus be argued, respectively, that such local access is an element of the environmental protection so integral to development or that privileged foreign consumption is unsustainable. Of course, one might just as easily argue the opposite. It is necessary, therefore, to try and identify more solid bases on which to assert such claims.

Agenda 21,⁹⁶ the detailed, sprawling “non-binding blueprint and action plan for a global partnership for sustainable development”⁹⁷ is of greater assistance. Although not binding, it nonetheless carries considerable weight as a statement of international commitment to the conduct of affairs affecting the environment. For example, paragraph 5.42 clarifies the scope of the “appropriate demographic policies” referred to in Principle 8 of the Rio Declaration. It provides, in relevant part, that “[p]opulation programmes are more effective when implemented together with appropriate cross-sectoral policies. To attain sustainability at the local level, a new framework is needed that integrates demographic trends and factors with such factors as ecosystem health, technology and human settlements, and with socio-economic structures and access to resources.”⁹⁸ Two things are notable here, namely the local focus and the emphasis on resource access. Similarly, paragraph 7.27 states that because “access to land is rendered increasingly difficult by the conflicting demands of industry, housing, commerce, agriculture, land tenure structures, and the need for open spaces,” special provision should be made for “environmentally sound physical planning and land use so as to ensure access to land to all households and where appropriate, the encouragement of communally and collectively owned and managed land.”⁹⁹ One could hardly hope to find clearer documentary support for a principle of access such as the one advocated here.

Do international legal commitments or instruments offer anything else? On the tenth anniversary of the Rio Summit that produced the eponymous Declaration and Agenda 21, representatives of nations from around the world again met to examine environmental issues. The 2002 Johannesburg Summit resulted in commitments that reinforced the importance of recognizing the

⁹⁵ *Id.* at 30-31.

⁹⁶ U.N.Doc.A/CONF.151/26 (1991).

⁹⁷ PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 57 (2d ed. 2003).

⁹⁸ *Report of the U.N. Conference On Environment and Development: Agenda 21*, U.N. GAOR, 47th Sess., Annex Z, ¶ 5.42, U.N. Doc A/CONF.151/26 (1992), available at <http://www.unep.org/Documents/Default.asp?DocumentID=52&ArticleID=53> (last visited Aug. 31, 2004).

⁹⁹ *Id.* ¶ 7.27.

rights of a country's own citizens when pursuing tourism development. For instance, the Summit expressed a commitment to "[d]eveloping community-based initiatives on sustainable tourism by 2004."¹⁰⁰ More broadly, the 2002 Summit articulated the aim of participants "to develop national programmes to promote sustainable local and community development . . . to empower people living in poverty and their organizations."¹⁰¹ These programs should "increase access to productive resources, public services and institutions, in particular land, water, [and] employment opportunities"¹⁰² More pointedly for this article, the Summit's Plan of Implementation recognizes that with respect to "land access and tenure" every effort should be made to "enhance sustainable livelihoods."¹⁰³ As indicated above, for many in Cuban coastal communities, a sustainable livelihood depends upon the continued existence of ecosystem resources that are often sacrificed in the name of tourist dollars.¹⁰⁴ Thus, this most recent U.N. commitment reinforces the need for and appropriateness of an access principle like that advanced in this article—one based on liberty.

Even more specifically, the Plan of Implementation provides that "in order to increase the benefits from tourism resources for the population in host communities, while [also] maintaining the cultural and environmental integrity of the host communities and enhancing the protection of ecologically sensitive areas and natural heritages," nations shall "[p]romote sustainable tourism development."¹⁰⁵ At least on the international stage, this is a position that Cuba maintains it endorses.¹⁰⁶

The Plan of Implementation provision concerning tourism also promotes direct foreign investment and public-private partnerships. At first glance,

¹⁰⁰ WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, KEY OUTCOMES OF THE SUMMIT 4, (Sept. 2002) available at http://www.johannesburgsummit.org/html/documents/summit_docs/2009_keyoutcomes_commitments.pdf (stating that this commitment was made in reference to the "small-island developing states") (last visited Aug. 31, 2004).

¹⁰¹ WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, PLAN OF IMPLEMENTATION, ¶ 6(c) (Sept. 2002) available at http://www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.htm (last visited Aug. 31, 2004) [hereinafter WORLD SUMMIT, PLAN].

¹⁰² *Id.*

¹⁰³ *Id.* ¶ 38(i), § IV(38)(i).

¹⁰⁴ See text accompanying note 100.

¹⁰⁵ WORLD SUMMIT, PLAN, *supra* note 102, ¶ 41.

¹⁰⁶ See CUMBRE DE JOHANNESBURG 2002: RESEÑA DE CUBA [JOHANNESBURG SUMMIT 2002: REPORT OF CUBA] 73, available at <http://www.un.org/esa/agenda21/natlinfo/wssd/cuba.pdf> (last visited Aug. 31, 2004). See also Fredric Evenson, *A Deeper Shade of Green: The Evolution of Cuban Environmental Law and Policy*, 28 GOLDEN GATE U. L. REV. 489, 500-01 (1998) (discussing Article 27 of The Cuban Constitution, which speaks of a national commitment to sustainable development for benefit of the citizenry); MINISTERIO DE CIENCIA TECNOLOGÍA Y MEDIO AMBIENTE [CUBAN MINISTRY OF SCIENCE, TECHNOLOGY, AND THE ENVIRONMENT] (CITMA), CUBA: ENVIRONMENT AND SUSTAINABLE DEVELOPMENT—10 YEARS AFTER RIO DE JANEIRO SUMMIT/RIO 10 (2002) (stating specific commitments and undertakings of the Republic relating to the environment) (on file with author).

this might seem to suggest that Cuban tourist development is in line with United Nations commitments because that is exactly the joint venture model Cuban tourist development is following. However, on closer inspection the provision continues to provide for a number of additional steps that such joint venture initiatives should take. These include working with

*local communities to develop and benefit from eco-tourism, and enhance stakeholder cooperation in tourism development and heritage preservation, in order to improve the protection of the environment, natural resources and cultural heritage Provid[ing] technical assistance to developing countries and countries with economies in transition to support sustainable tourism business development and investment and tourism awareness programmes, . . . improv[ing] domestic tourism, and . . . stimulat[ing] entrepreneurial development*¹⁰⁷

Further, the provision provides that such joint ventures should “[p]romote the diversification of economic activities, including the facilitation of access to markets and commercial information, and participation of emerging local enterprises, especially small and medium-sized enterprises.”¹⁰⁸ What appears to be lacking in Cuba is just such local benefit and promotion of entrepreneurial development. While Cuba has a controlled economy, the example of the growth of diversified food markets since the beginning of the Special Period¹⁰⁹ demonstrates that the growth of entrepreneurial activity will be tolerated, even in an economy as controlled as Cuba’s. Therefore, it is essential that Cuba respect the wisdom of this commitment and that the government both incorporates local benefits into and promotes a role for local entrepreneurial activity into its tourist developments.

As the provision from the Johannesburg Plan of Implementation indicates, it is equally crucial that such ecologically-sensitive development should be advanced with the cooperation and material support of foreign partners. This commitment begs the further question of exactly what the forms of assistance and support for environmentally-sustainable goals might and should be. The answer is not self-evident. Some commentators have noted, for instance, that exhortations to expand ecotourism can in fact do more harm than good to host communities.¹¹⁰ What is needed, therefore, are

¹⁰⁷ WORLD SUMMIT, PLAN, *supra* note 102, ¶ 41(b)-(c) (emphasis added).

¹⁰⁸ *Id.* ¶ 41(e).

¹⁰⁹ See, e.g., Gonzalez, *supra* note 6, at 726.

¹¹⁰ See, e.g., Carla Gowen McClurg, *The International Year of Ecotourism: The Celebration of a New Form of Colonialism*, 34 MCGEORGE L. REV. 97, 108-09 (2002) (noting that ecotourism tends not to benefit host communities due to “commodification, standardization, loss of authenticity and staged authenticity,” and “adaptation to tourist demands for host communities”).

revised concepts of ecotourism and development of new tourist sites that privilege access by locals and nationals over foreigners. Note that I said "privilege;" I did not say "exclude." Tourism is here to stay. The problem for a nation like Cuba, of course, is that, in the short term, this is a costly choice.

There are emerging options, however, that Cuba might follow. For example, a new development in Punta Cana, one of the most popular resort destinations in the Dominican Republic, will include housing, health, and education facilities for local workers.¹¹¹ In Ecuador, an ecotourism venture involving indigenous people, first as guides and eventually as joint venture partners, may help relieve pressure to develop the area for oil production.¹¹² Although these two isolated examples hardly demonstrate the reorientation of an entire sector of the global economy, they nonetheless give hope that in Cuba, as elsewhere, alternative paths might be followed that allow nations to balance the pressure for tourist dollars local needs.

D. A Role for the United States?

Given the Bush Administration's saber-rattling against Cuba,¹¹³ it is unlikely that the United States will ever work to thaw the "Caribbean Cold War" in which we are still engaged. Nonetheless, the optimist in me says that it is worth noting a strategic opportunity here for the United States and one that will, incidentally, have the potential to serve important environmental goals. For many years now, some Cuba observers have noted that "[t]he United States is overlooking the present opportunities developing in Cuba by adhering to its hard line embargo of Cuba."¹¹⁴ One way to reverse that trend is to learn the lessons—and pitfalls—of unbridled tourist development. It actually might serve U.S. goals of Cuban regime change, in a non-threatening way that does not raise Cuban fears of invasion or exploitation, were U.S. advisers allowed to come to Cuba to assist local communities on, for example, ideas for implementing economic development. These ideas would almost unquestionably focus on forms of entrepreneurial activity, no matter how small. Similarly, the United States is blessed with superb universities and institutes devoted to the study of oceanographic and marine resources, forestry schools, and other university-based environmental specialty programs. These might be drawn upon to send advisers to provide technical

¹¹¹ David Gonzalez, *A Different Standard of Living: Dominican Resort Is a Community Project for Developers*, N.Y. TIMES, Aug. 29, 2003, at W1.

¹¹² Juan Forero, *Kapawi Journal; Ecuador Indians Fend Off Oil Companies With Tourism*, N.Y. TIMES, Jan. 19, 2004, at A4.

¹¹³ See, e.g., John D. MacKinnon & Marcus Walker, *Fed Fines UBS \$100 Million For Money-Transfer Violations*, WALL ST. J., May 11, 2004, at A3 (observing, *inter alia*, that the Bush Administration is "anxious to reassure Cuban-Americans in South Florida that the U.S. is resolute in enforcing trade sanctions against the Castro government.").

¹¹⁴ Francisco J. Vinas, *Establishing and Protecting United States Foreign Investment in a Post Castro Cuba: By Waiting for Castro, Will U.S. Investors Miss the Boat?*, 5 J. TRANSNAT'L L. & POL'Y 227, 234 (1996).

assistance on the sustainable management of resources, allowing Cuba to create a system of national parks like the U.S. National Park System.

IV. CONCLUSION.

Ultimately, of course, the choice is Cuba's. It is not an enviable one. It is easy to say that they should adopt a course that favors protection of national, natural resources over a strong, short-term interest in dollars. But, if the thing that one values is the health and welfare of its citizenry and the land that sustains them, in order to preserve, for instance, their liberty to roam in nature and so feed the imagination, this may be just the right course.

